U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 18 July 2003

CASE NUMBER: 2002-LHC-02007

OWCP NUMBER: 14-129973

In the Matter of :

TERRANCE V. OLSON,
Claimant,
v.

MARINE TERMINALS CORP.,
Employer,
and

MAJESTIC INSURANCE CO.,
Insurer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

Peter Preston, Esq.
Preston, Bunnell & Stone
1100 SW 6th Avenue, Suite 1405
Portland, Oregon 97204
For the Claimant

William M. Tomlinson, Esq.
Lindsay, Hart, Neil & Weigler, LLP
1300 SW 5th Avenue, Suite 3400
Portland, Oregon 97201
For the Employer and Insurer

Matthew Vadnal, Esq.
Office of the Solicitor
U.S. Department of Labor
1111 3rd Ave., Suite 945
Seattle, Washington 98101
For the Director, OWCP

Before: **Paul A. Mapes**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter referred to as "the Longshore Act" or "the Act"). A trial on the merits of the claim was held in Portland, Oregon, on February 12 and 13 , 2003. All parties, including the Director of the Office of Workers' Compensation Programs, were represented by counsel. During the trial, the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1 to 34, and Employer's Exhibits (EX)1-88.

BACKGROUND

Terrance Olson (hereinafter "the claimant") was born on August 2, 1945 and attended a community college for one year after he graduated from high school. EX 18 at 39, CX 31 at 87, CX 33 at 142. He began working as a longshoreman in 1970 and is presently classified as a Class A longshoreman eligible to seek work through his union local's non-skilled hiring board. EX 82 at 666, CX 32 at 106, Tr. at 120.

A. Prior Injuries

During the course of the claimant's nearly 30 years of longshore employment, he has been injured at least seven times. One of the first of these injuries occurred on April 3, 1980, when the claimant fell approximately 50 feet into a hold of a ship and suffered compression fractures to three of his lumbar vertebra. EX 2 at 2-3. The claimant was hospitalized for six days, and determined to be neurologically intact. EX 2 at 3. He was discharged from the hospital on April 9, 1980 and fitted with a brace. EX 2 at 3, EX 3 at 9. Dr. Lawrence J. Cohen provided most of the treatment for the claimant's back injury, and on September 18, 1980, determined that the claimant, though still reporting back pain, would be able to return to work on September 27, 1980. EX 4 at 10. The claimant continued to report back pain during the subsequent year, including pain upon lifting 40-pound objects. EX 5 at 11, EX 6 at 12.

On April 20, 1981, Dr. Cohen reported that the claimant's back condition was medically stationary, that his fractures had healed without sensory or motor loss, and that there was residual disability to the claimant's lumbar spine in the form of continued pain and weakness. EX 6 at 12-13. The claimant filed a claim and received compensation under the Act. EX 2 at 8, EX 7 at 14, EX 14 at 29-32. The claimant was released back to regular duty work in April 1981. EX 7 at 14, EX 8 at 15.

On September 2, 1982, the claimant underwent an evaluation by orthopedic surgeon Dr. Calvin Keist. EX 8 at 15. According to Dr. Keist's report, the claimant had been working regular duty jobs during the previous year, but had been avoiding particularly difficult jobs such as loading logs or sacks. EX 8 at 15. Dr. Keist's report also indicates that the claimant complained of "radiation of pain into his buttocks and into both legs, primarily his left leg," as well as "numbness in his legs." EX 8 at 15. Dr. Keist performed straight leg raising tests, which he found to be "probably positive" for the left leg. EX 8 at 16. In addition, Dr. Keist found atrophy of the claimant's left leg, amounting to a one-inch difference in size between the claimant's left calf and his right calf. Dr. Keist also opined that the claimant had degenerative changes in the L4 vertebrae which pre-existed his 1980 injury. Dr. Keist concluded that, based on the claimant's injuries, he would have a "diminished work span as an unlimited longshoreman," but did not define what he meant by the term "unlimited." EX 8 at 17.

On January 4, 1983, Dr. Cohen examined the claimant, who reported increased pain in his left leg when lifting. EX 9 at 18. Dr. Cohen did not find any sensory loss in the claimant's left leg, but

he recommended a CT scan of his lumbar spine in order to rule out the possibility that the claimant had suffered injury to an inter-vertebral disc.

On February 15, 1984, the claimant was examined by orthopedic surgeon Lawrence Langston. EX 10 at 19. The claimant reported pain in his left hip, difficulty performing longshore work, and problems when playing golf or working in his yard. The claimant also reported pain in his left gluteal region, left distal thigh, and left calf and heel cord. EX 10 at 20. Based on his physical examination of the claimant and his review of x-rays, Dr. Langston concluded that the claimant was continuing to suffer from residual symptoms from his 1980 fall. EX 10 at 22. Dr. Langston also found, however, that the amount of deformity in the claimant's back was "minimal" and that it was his experience that "people who suffer from fractures of the degree that Mr. Olson is suffering, recover with minimal or no significant impairment." In addition, Dr. Langston opined that the results of a CT scan which was done on January 10, 1983 were "essentially normal as far as any evidence of ruptured intervertebral disc."

On May 22, 1984, Dr. Cohen again examined the claimant, who reported pain in his lower back and left leg. EX 12 at 26. The claimant also stated that he was only taking easy jobs at this point. Dr. Cohen reviewed a CT scan from February 1983 and found that the results were "within normal limits."

On November 6, 1984, Dr. Cohen re-examined the claimant, who again reported continuing pain in his lower back, "mostly the lower lumbar area and some pain in the left lower extremity, from the buttocks to just below his left knee." EX 13 at 28.

On February 19, 1985, the claimant returned to Dr. Cohen. EX 13 at 27-28. The claimant reported increased pain in his lower back and more pain in his left leg. In addition, the claimant recounted a work incident approximately one month earlier in which he was assigned a demanding four-hour shoveling job that caused him "a great deal of pain in his lower back and left lower extremity," and made it necessary for him to get the assistance of his co-workers in order to exit the grain elevator. Dr. Cohen noted findings of tenderness at L4-5, in the midline, and left sacro-liliac area. The claimant was limited on the left straight leg raising test to 70 degrees. Upon a neurological examination, Dr. Cohen concluded that the claimant had "a slight area of hypesthesia in the left thigh."

On August 20, 1991, the claimant suffered another work-related injury as he was driving a fork lift. EX 15 at 33, EX 16 at 35. The claimant was apparently "snapped backward" and a bar at the bottom of his seat hit him in the lower back. EX 15 at 33. The claimant reported considerable pain following the accident, but x-rays revealed no new fractures of his back. The claimant was subsequently examined four times based on this accident and he remained unable to work for at least four weeks. EX 15 at 33. The claimant began a course of physical therapy and, at a September 6, 1991 session, reported posterior leg pain "all the way to the ankle,"although the record does not indicate to which leg the claimant referred, and "constant fatigue in his anterior thighs." EX 17 at 36-38. The claimant also reported "pain across the hip area" with the symptoms being worse on the left side than on the right side.

In 1992, the claimant made a state workers' compensation claim for an injury to his left lower quadrant that was alleged to have occurred on February 17, 1992. EX 80 at 599. The claim was subsequently denied on May 18, 1992.

On June 5, 1992, the claimant injured his right ankle while working. EX 26 at 63. He underwent an examination by orthopedic surgeon Dr. Bryan Laycoe who found a two percent impairment of the claimant's lower right extremity based on a loss of mobility. EX 26 at 63-68.

On September 24, 1993, the claimant slipped at work and was taken to an emergency room. EX 18 at 39. Dr. T. Craven diagnosed the claimant's injury as a left rib fracture and a laceration of the right upper eyelid. EX 20 at 45, EX 21 at 46, EX 22 at 48, EX 80 at 457-59, 632-33. In addition, Dr. Lawrence Cohen later indicated that there were some symptoms in the claimant's right leg and a contusion on his abdomen. EX 23 at 49, EX 24 at 51. The claimant settled a claim for this injury under subsection 8(i) of the Act and returned to work on January 8, 1994. EX 24 at 54.

On August 7, 1994, the claimant injured his right shoulder after falling from a ladder. EX 25 at 56. As a result of this injury, the claimant underwent surgery on his rotator cuff and remained unable to work until August 1995. EX 25 at 58, EX 29 at 75. Due to continuing symptoms, the claimant was periodically unable to work during the fall of 1995. The claimant received 46 weeks of temporary total disability compensation and later settled a claim for additional compensation pursuant to subsection 8(i) of the Act. EX 30 at 80, EX 31 at 83.

On October 17, 1995, the claimant injured his back in the left hip area while shoveling. EX 80 at 437. On October 19, 1995, the claimant began treatment with Dr. Jean Chapman at a Kaiser Permanente Occupational Health Clinic. EX 80 at 430-42. The claimant initially reported stiffness in his hip area. The claimant was limited on the left straight leg raising test at 45 degrees and was diagnosed as having a "lumbrosacral strain, moderately severe."

On March 19, 1996, Dr. Chapman examined the claimant, who reported greatly increased low back pain and recurrent left hip and left leg pain. EX 80 at 431. Dr. Chapman noted a marked spasm in the claimant's lumbrosacral area, but got negative results when he gave the claimant bilateral straight leg raising tests. Dr. Chapman noted an impression of a moderate lumbrosacral strain.

On March 28, 1996, the claimant made a final visit to Dr. Chapman. EX 80 at 429. The claimant reported minimal low back pain, but pain in his left buttocks and a dull constant twinge upon twisting too far. At this point, the claimant was occasionally using medication for the pain. Dr. Chapman considered the claimant's lumbosacral strain "essentially resolved," and concluded that the claimant was medically stationary.

The claimant has also been compensated for a 45 percent work-related binaural hearing loss. EX 46 at 116-22.

B. Injury of February 19, 1999

While working on a ship as a hatch boss for Marine Terminals Corp. on February 19, 1999, the claimant slipped on a wet surface on the ship's main deck. CX 1 at 1, CX 6 at 8, EX 34 at 91. According the claimant's trial and deposition testimony, he fell onto his buttocks with his left leg underneath him. EX 82 at 685, Tr. at 128-29. After a friend drove the claimant to a company office, he was transported by ambulance to the Woodland Park Hospital Emergency Room. CX 1, CX 6 at 6, EX 35 at 92. According the ambulance records, the claimant complained of left knee pain but denied "LOC, SOB, Cx pn, Abn pn, Neck & **Back pn**." CX 5 at 5, EX 35 at 93 (emphasis added). The emergency room records contain no legible reference to any complaints of back pain, but these records are mainly illegible hand written notes. CX 6 at 6, EX 35 at 92. The treating physician diagnosed a left knee strain, precluded the claimant from standing, walking, climbing, and squatting, and discharged the claimant in a wheelchair. CX 6 at 6, EX 35 at 92. Upon review of x-rays, radiologist Roderick Saxey noted an impression of "soft tissue swelling with possible tiny effusion," in the claimant's left knee, and "no significant soft tissue or bony abnormality" regarding the claimant's left femur. CX 6 at 9, EX 36 at 94.

Beginning on February 20, 1999 the employer began paying the claimant temporary total disability compensation at the rate of $871.76 per week. CX 3 at 3.

On February 23, 1999, the claimant was examined by Dr. Stefan Tarlow. CX 7 at 10. The record does not indicate whether Dr. Tarlow is board certified in a particular specialty. Dr. Tarlow diagnosed a "left knee quadriceps tendon rupture." CX 8 at 11.

On March 3, 1999, Dr. Tarlow performed surgery on the claimant to repair a torn left quadriceps tendon. CX 8 at 11. During the trial and at a pre-trial deposition, the claimant testified that he started using a heavy brace following this surgery, and that at this point he began to first "really" notice pain in his back. EX 82 at 696, Tr. at 133.

Beginning on May 27, 1999 and continuing through at least March 9, 2001, the claimant underwent a course of physical therapy at Vancouver Rehabilitation and Therapy Clinic, and sometimes attended therapy sessions as often as three times a week. EX 81 at 64.

Over the next several months, the claimant attended regular follow-up examinations with Dr. Tarlow. CX 9 at 12-27. On March 12, 1999, Dr. Tarlow examined the claimant and noted that he was unable to return to work. CX 9 at 12. On April 16, 1999, Dr. Tarlow noted that the claimant's left knee condition was improving and recommend that the claimant stop using a brace on his leg and begin attending physical therapy. CX 9 at 13, 14. On April 27, 1999, Dr. Tarlow recorded that the claimant misstepped while walking down a flight of stairs and noted the claimant's reported "intense" knee pain and swelling of his knee. CX 9 at 15. During a subsequent deposition, the claimant described the misstep as having "jarred [his knee] pretty good." EX 82 at 687. On May 27, 1999,

Dr. Tarlow noted that the claimant was still not ready to return to work. CX 9 at 16. On July 6, 1999, Dr. Tarlow noted that the claimant's knee was weak and buckling. Dr. Tarlow concluded that the claimant was still unable to work, but that he could discontinue formal physical therapy and begin biking, hiking, or walking. CX 9 at 17. None of Dr. Tarlow's reports concerning these office visits contain any reference to any kind of complaints of back pain.

On August 4, 1999, at the request of the employer, Dr. Bryan Laycoe, an orthopedic surgeon, examined the claimant and prepared a report of his findings. EX 10 at 28. The record does not indicate whether Dr. Laycoe is board certified in any specialty. Based on the examination, the claimant's self-reported history, and x-rays, Dr. Laycoe opined that: (1) the claimant's left knee injury prevented him from performing his regular job, (2) the claimant's condition should improve with continued exercise, and (3) that the claimant's condition might become permanent and stationary within 6 to 8 weeks. CX 10 at 30-31.

On August 27, 1999, Dr. Tarlow again examined the claimant and found that the claimant's left leg was weak. He recommended that the claimant join a health club. CX 9 at 18.

On September 20, 1999, Dr. Tarlow received a copy of Dr. Laycoe's report and signed a statement indicating that he agreed with Dr. Laycoe's findings. CX 11 at 32.

On November 2, 1999, Dr. Tarlow found that the claimant's left knee remained weak and that the claimant was unable to return to regular duty work. CX 9 at 20.

On December 21, 1999, in response to a letter from the employer's insurance carrier, Dr. Tarlow opined, "There are some jobs that Mr. Olson would be able to do," and that the claimant had a "partial temporary disability rather than total temporary disability." CX 9 at 21.

On January 11, 2000, Dr. Tarlow found that the claimant's knee remained weak, but nevertheless opined that "[the claimant] is stationary, [he is] returning to work on Saturday, January 15 for temporary release and recheck February 1 planning full release for all work activities."

On February 1, 2000, Dr. Tarlow noted the claimant's reports of soreness and occasional buckling of the left knee, and that the claimant had worked several shifts as a longshoreman doing non-strenuous work. CX 9 at 24. Dr. Tarlow recommended limited light duty work until his next appointment on February 8, 2000. CX 9 at 24.

During February 2000, the claimant worked approximately 11 shifts as a longshoreman. EX 82 at 689. At his deposition, the claimant testified that these jobs were not physically demanding and that his left knee condition remained the same over these days. EX 82 at 689-95. He eventually stopped working, the claimant testified, because he was incapable of doing the jobs that subsequently became available. EX 82 at 691. The claimant did not specify why he thought he was incapable of performing these jobs.

On February 3, 2000, the claimant underwent a MRI scan of his left knee. Dr. Tyler Lippincott interpreted the images and noted the following impressions: (1) "[p]robable tear posterior horn medial meniscus, (2) "[t]hickening of quadriceps tendon and distortion of superior pole of the patella related to repair of torn quadriceps tendon," and (3) "[s]uspected thinning and slight irregularity of patella cartilage involving the lateral facet." CX 9 at 25. Based on the scan results, Dr. Tarlow opined that the claimant possibly had a torn medial meniscus as well as patellar arthrosis. CX 9 at 26.

On February 11, 2000, Dr. Tarlow recommended a diagnostic arthroscopy but also concluded that the claimant could continue with light duty work until the procedure could be performed. CX 9 at 26.

On April 24, 2000, the claimant began receiving treatment from Dr. Dennis J. Davin, an orthopedic surgeon. CX 27 at 63. During the claimant's trial and pre-trial deposition testimony, he recalled that he sought treatment from Dr. Davin because he felt that Dr. Tarlow was not adequately listening to his complaints, including his complaints concerning his alleged back pain. Tr. at 136, EX 82 at 693-94. Based on the claimant's reported complaints of knee pain and popping, medical history, and a physical examination, Dr. Davin noted an impression of a medial meniscal tear, found that surgical evaluation and debridement was indicated, and opined that the claimant should remain on restricted work duty until surgery could be performed. However, Dr. Davin's report concerning his initial meeting with the claimant does not mention any back problems, other than to note that the claimant had a back injury in 1980 that "healed uneventfully." CX 27 at 63.

On May 4, 2000, Dr. Davin performed surgery on the claimant's left knee. CX 13 at 34.

On May 8, 2000, the claimant returned for a follow-up examination with Dr. Davin. CX 27 at 63. Dr. Davin noted that the claimant was recovering normally and would remain unable to work until the stitches from the surgical wound could be removed.

On May 17, 2000, the claimant attended an additional follow-up examination with Dr. Davin. CX 27 at 64. Dr. Davin removed the claimant's stitches, but found that the claimant required further pain medication and was unable to return to work.

By letter dated May 17, 2000, Dr. Davin provided a report on the claimant's condition to the employer's insurance carrier. CX 14 at 36. Dr. Davin opined that it was "more likely than not" that the damage to the claimant's knee was due to the February 19, 1999 injury rather than the misstep reported on April 27, 1999. CX 14 at 36. Dr. Davin noted the claimant's high level of motivation to improve and stated that he expected the claimant to recover in a timely fashion. CX 14 at 36.

On June 1, 2000, Dr. Davin again examined the claimant. CX 27 at 64. Dr. Davin determined that the claimant required further physical therapy and was still unable to return to work.

On June 8, 2000, in response to an inquiry by the employer's insurance carrier, Dr. Tarlow stated that the claimant's misstep is "certainly a reasonable explanation for his torn meniscus." CX 9 at 27.

On June 15, 2000, the claimant left a message with a Kaiser Permanente answering service, requesting motion sickness medication to be used during a 26-day fishing trip he planned to take in three weeks. EX 80 at 343. The message was apparently given to a Dr. Chen.

On June 19, June 29, and July 31, 2000, Dr. Davin performed additional examinations of the claimant. CX 27 at 64-65. Dr. Davin concluded, at each visit, that the claimant's knee condition required further physical therapy and that the claimant was not yet ready to return to work.

In July 2000 the claimant went on a two to three week fishing trip to Alaska with some friends and his grandson. EX 82 at 702. According to the claimant's deposition testimony, he caught fish weighing up to 30 pounds. EX 82 at 713. John Ronne, a friend of the claimant who also went on the trip, testified at the trial that the claimant mostly sat on a cushioned seat and only occasionally got up to move around. Tr. at 56-58. Mr. Ronne also testified that the water conditions were flat, but did not indicate whether the claimant had used any of the sea sickness medication he had requested from Dr. Chen. Tr. at 56- 58. The claimant testified at his deposition that during the trip he experienced lower back pain, knee pain, and pain down his leg, although he did not specify whether this was his left knee or leg. EX 82 at 705.

On August 10, 2000, the claimant was injured when leaked fuel exploded on his boat. EX 53 at 136, EX 80 at 316-338, 356-68. According to the claimant's trial and deposition testimony, the claimant was knocked to the side of the boat by the explosion, and according to the medical reports, the claimant suffered burns on his right arm and both legs. Tr. at 158, EX 82 at 706-09, EX 53 at 136, EX 53 at 136. As a result of the accident, the claimant suffered second degree burns to over nine percent of his body, requiring four days of treatment at an in-patient burn center. EX 53 at 137-225.

On September 6, 2000, the claimant reported his boat accident to Dr. Davin. CX 27 at 65. Dr. Davin found that the burns on the back of the claimant's legs "slowed down his rehabilitation a little bit," but that his knee condition had nevertheless improved. Dr. Davin released the claimant to "sedentary to light duty with no ladder climbing, no stair climbing, and no kneeling or crawling, etc." The claimant apparently told Dr. Davin that work was available at that time which would accommodate those restrictions. Dr. Davin noted that he hoped to have the claimant medically stationary in the next two to three months.

On October 4, 2000, the claimant returned for an examination with Dr. Davin. CX 27 at 66. Dr. Davin noted that the claimant continued to make "slow progress," but that he was not ready to return to heavy labor, including work involving the use of ladders. Dr. Davin signed a note excusing the claimant from work until November 1, 2000. CX 16 at 40.

On October 30, 2000 Dr. Davin again examined the claimant, who reported low back pain with left-side radiation. CX 27 at 66. Based on this examination as well as a review of x-rays of the claimant's lower back, Dr. Davin opined that the claimant was suffering from "radicular pain that goes down his left side into the left calf." Dr. Davin noted that this condition has "been unremitting and seems to be getting worse." He also ordered a MRI scan of the claimant's back.

On November 1, 2000, the claimant underwent an MRI scan of his lumbar spine. Dr. Daniel R. Kocarnik interpreted the images and noted the following impressions: (1) "[m]oderate degenerative disc disease at the L2-3 level," and (2) "[m]ild to moderate facet arthritis in the lower lumbar spine with mild encroachment on the lateral recesses at the L4-5 level, left slightly more so than right." CX 17 at 41.

On November 8, 2000, at the request of employer, Dr. Laycoe performed an additional examination of the claimant. The claimant reported left knee symptoms and pain in his lower back and left thigh. Based on the examination, the claimant's reported symptoms, the chart notes of Dr. Davin, and the medical records pertaining to the claimant's surgeries, Dr. Laycoe prepared a report finding that: (1) the claimant's left knee condition consists of a permanent loss of patella mobility and knee range of motion, (2) the claimant is unable to return to work as a longshoreman due to his inability to kneel, squat, and climb, (3) the left knee condition is medically stationary, (4) the claimant's left knee condition corresponds to a 19 percent impairment to his lower extremity under the fourth edition of the AMA *Guides to the Evaluation of Physical Impairment* based on a loss of range of motion and the medial and lateral partial meniscectomy, (5) the claimant's reported back pain was possibly due to having "aggravated his pre-existing degenerative conditions," perhaps by "favoring his leg as he is walking," and (6) that in regards to the claimant's work, his back condition is "not really a limiting factor to him versus the significant limitations that he has from his left knee." CX 18 at 48. Dr. Laycoe did not base his conclusions on any of the diagnostic images such as the claimant's MRI scans. CX 18 at 45, 48.

On November 16, 2000, Dr. Joseph P. Stapleton, an associate of Dr. Davin, administered injections to the L4-5 and L5-S1 regions of the claimant's spine. CX 19 at 49. In his subsequent report, Dr. Stapleton noted that the claimant experienced 15 days of relief from his back pain as a result of this procedure. CX 20 at 51.

On November 27, 2000, Dr. Davin again examined the claimant, who reported both back and knee pain. CX 27 at 67. Dr. Davin noted that the claimant's back pain appeared to have been moderated by the injections and that additional injections would be a reasonable course of treatment. In evaluating the claimant's knee, Dr. Davin found that the claimant had not developed the requisite strength to return to his normal employment.

On November 29, 2000, Dr. Davin added lumbar strengthening exercises to the claimant's physical therapy regime. EX 81 at 642.

On December 6, 2000, Dr. Laycoe reviewed the claimant's November 1, 2000 MRI scan. EX 58 at 237. Dr. Laycoe reported to the employer's insurance carrier that the scan results did not change the opinion expressed in his November 8, 2000 report. Dr. Laycoe added, however, that he believed that the claimant could "work with back symptoms from degenerative disc deceace [sic]."

On December 7, 2000, Dr. Stapleton gave the claimant a left L4-5 facet injection and an additional colloidal epidural steroid injection. CX 20 at 51.

On December 8, 2000, Dr. Davin signed a note stating that he had examined the claimant on November 27, 2000 and that he should be excused from work until December 27, 2000. CX 21 at 52.

On December 27, 2000, the claimant returned for an examination with Dr. Davin. CX 27 at 68. Dr. Davin concluded that, while the claimant's knee had improved since surgery, it had not markedly improved since his last examination. Dr. Davin reviewed the report from an unspecified outside medical examination, and indicated that he agreed that the claimant's back condition was not "completely debilitating." However, Dr. Davin added that he was concerned that the claimant's left knee condition continued to prevent him from performing his normal job duties of climbing and squatting. Dr. Davin also concluded that the claimant was unlikely to be able to return to his previous job.

On December 28, 2000, Dr. Davin signed a note stating that the claimant had been seen the previous day and opined that the claimant was unable to work until January 31, 2000. CX 21 at 53.

On December 29, 2000, the claimant returned to Dr. Stapleton, who observed "some improvement" from the previous two injections, and administered additional epidural injections to the claimant's lower back. CX 22 at 54.

On January 31, 2001, the claimant returned to Dr. Davin. CX 27 at 68. In evaluating the claimant's knee, Dr. Davin was again doubtful that the claimant would be able to return to the full duties of his longshore work, but felt that further rehabilitation was indicated, and he declined to perform a closing examination until a later date. Dr. Davin also evaluated the claimant's back, and noted that he agreed with the conclusions of an unspecified outside medical examiner insofar as he found that the claimant did have degenerative changes and a probable nerve impingement in the L4-5 area. The claimant's back condition, Dr. Davin found, limited the claimant to essentially sedentary work and precluded him from lifting more than ten pounds, kneeling, crawling, stair climbing, and ladder climbing.

On March 7, 2001, Dr. Davin again examined the claimant. CX 27 at 69. Dr. Davin found that the claimant had experienced "a period of marked exacerbation of his back pain." As well, Dr. Davin noted that the claimant's symptoms had reached a point where a decision needed to be made as to whether aggressive or conservative treatment should be administered. In addressing the claimant's left knee, Dr. Davin concluded that the condition would be medically stationary within the next month if no further improvement was observed.

On April 11, 2001, the claimant returned to Dr. Davin. CX 27 at 69. Dr. Davin found that the claimant's knee had continued to slowly improve and was "essentially" medically stationary. Dr. Davin noted that, while the claimant's back condition was also a concern, it was not severe enough to require surgical intervention.

On April 19, 2001, the claimant requested medical records in support of a claim for Social Security disability benefits based on allegations of back pain, knee pain, vision loss, and hearing loss. EX 80 at 369-71.

On May 14, 2001, Dr. Davin again examined the claimant. CX 27 at 70. According to Dr. Davin's notes, earlier that week the claimant had reported to Dr. Davin a "flare" of his back pain and difficulty walking, prompting Dr. Davin to prescribe pain and anti-inflammatory medications. Dr. Davin noted that the claimant's condition had "settled down a bit," but that he was still experiencing a "fair amount of discomfort." If the claimant's condition did not improve, Dr. Davin concluded, it would be time to perform an evaluation for decompressive surgery.

On June 13, 2001, the claimant returned to Dr. Davin, who found increased problems with the claimant's back and noted that the claimant's reports of pain were "consistent with advanced sciatia." CX 27 at 8. At this point, Dr. Davin's "big concern" was the claimant's back. Dr. Davin commented that the claimant had "been very compliant," and that a further evaluation by a neurosurgeon was now indicated. Dr. Davin also concluded that the claimant was unable to resume his duties as a longshoreman, but he did not specify the reasons for this conclusion.

On July 2, 2001, the claimant was examined by Dr. Curtis Hill, a board-qualified neurological surgeon. CX 23 at 55, CX 29 at 83, Tr. at 191. Dr. Hill found a "moderately positive straight leg raising test on the left side," a result which, as he described in his trial testimony, "indicates that there is irritation to the nerve root." EX 23 at 55, Tr. at 196. Based on the claimant's history, his MRI scans, and the physical examination, Dr. Hill reported that the claimant had "what sounds like radicular symptoms, relative to the L5 nerve root, probably L4 as well," and additionally, that the claimant had "changes at the level of L4-5." CX 23 at 56. Based on these findings, Dr. Hill ordered a CT-myelogram scan. CX 23 at 56.

On July 6, 2001, the claimant underwent a CT scan of his lumbar spine and a lumbar myelogram. Dr. Phillip J. Schilling interpreted the images and noted the following impressions: "Small disc protrusion on L4-5 on the left that appears to impress the L5 nerve root in the lateral recess. This is similar to the outside scan from EPIC dated 11/1/00." CX 24 at 57-58. That same day, Dr. Davin examined the claimant and noted the claimant's complaints of knee problems, concluding that this was a "combination of radicular pain and the ongoing difficulty of post surgically [sic] from his left knee." CX 27 at 71. Dr. Davin administered a corticosteroid injection to the claimant's left knee.

On August 15, 2001, the claimant was examined by both Dr. Hill and Dr. Davin. CX 25 at 60, CX 27 at 71. During Dr. Hill's examination, Dr. Hill explained the risks of surgery for

decompression of the claimant's L5 nerve root. Based on his examination and a review of the claimant's myelogram and CT scan, Dr. Hill opined that the tests indicated "some nerve root compression at L5 to the left" that was "consistent with the pain radiating down the back of his leg to the calf." When Dr. Davin examined the claimant later the same day, he found that the claimant's left knee symptoms had been improved by the injections, and he commented that decompressive surgery would help "sort out" the claimant's knee symptoms from his back symptoms. CX 27 at 71.

On September 12, 2001, Dr. Davin again examined the claimant. CX 27 at 72. Dr. Davin gave the claimant an additional steroid injection and noted that the claimant would be returning to Dr. Hill for treatment of his back. Dr. Davin opined that the claimant was "at the point where he is medically stationary" and noted that he would confirm this opinion at an examination in one month.

On October 22, 2001, the claimant returned to Dr. Davin. CX 27 at 72. The claimant's left knee symptoms continued to improve, Dr. Davin noted, but the claimant was still having "ongoing back problems and radicular findings." Dr. Davin indicated that Dr. Hill had recommended back surgery, but that the claimant was delaying any decision due to a lack of authorization from the insurer. Dr. Davin declined to considered the knee condition resolved until it could be determined how much of the claimant's knee symptoms were due to the back condition.

On November 28, 2001, Dr. Davin again examined the claimant. CX 27 at 73. Dr. Davin opined that the claimant's knee problems were ongoing and "stationary mechanically," but that the potential for improvement would depend on the results of the claimant's back surgery, which Dr. Davin stated was delayed.

On December 10, 2001, the claimant was examined at the employer's request by Dr. Joel Seres. EX 67 at 248-259. Dr. Seres is board certified in both neurological surgery and pain medicine. EX 83 at 736. During the examination, the claimant reported pain in his left knee, low back, and lower left leg. EX 67 at 248-250. In particular, the claimant reported pain radiating from his low back down the back side of his left leg as far as the knee, and on rare occasions, down to the back of his calf to his ankle. EX 67 at 248-49. Upon physical examination, Dr. Seres found negative results on straight leg raising tests, no radiation of pain, negative "Marxer's signs," and "negative femoral nerve stretch signs." EX 67 at 256. Based on a review of the claimant's medical records, imaging studies, and his physical exam, Dr. Seres noted two relevant impressions. First, Dr. Seres found "mechanical low back pain without specific findings documenting a specific level of dysfunction," and no evidence of "nerve root compression." EX 67 at 257-58. Dr. Seres added, however, that the claimant had "some sensory loss over the buttock," but that this was "clearly nonphysiologic in its presentation and is not in the distribution of nerves in question here." EX 67 at 258. In this regard, Dr. Seres concluded that no evidence indicated that the claimant had a herniated disc as a result of the February 19, 1999 accident, that his symptoms were "virtually the same" as they were following the 1980 accident, and that his symptoms were "certainly compatible" with the natural course of any residual problem he may have had from his 1980 accident. In addition, Dr. Seres found "[p]ersisting pain in the left knee in association with some generalized atrophy of the left lower extremity." Dr. Seres also opined that the surgery suggested by Dr. Hill was unreasonable and unnecessary at the time, and, at any rate, unrelated to the injury of February 19, 1999. EX 67 at 259.

On December 21, 2001, the claimant returned to Dr. Hill complaining of low back and hip pain. CX 25 at 60. Dr. Hill ordered an additional MRI and prescribed a course of Decadron. CX 25 at 60. Later that same day, the claimant underwent a MRI scan. CX 26 at 61. Dr. Warren S. Tubbs interpreted the scan and noted "[c]entral canal narrowing is mild at L3-4 and mild to moderate at L4-5. Neural foramen narrowing is mild bilaterally at L4-5 proximally due to facet hypertrophic changes." CX 26 at 61.

On December 26, 2001, Dr. Davin again examined the claimant. CX 27 at 73. Dr. Davin noted that the claimant had experienced "crippling back pain" during the previous week and that he and Dr. Hill had begun a course of new medications. Dr. Davin reiterated his conclusion that evaluating the status of the left knee was problematic given the potential interaction of the back condition. As of this visit, Dr. Davin had not had the opportunity to review an outside medical exam which apparently had been performed.

On January 9, 2002, the employer stopped payments of temporary total disability compensation. EX 69 at 261.

On January 28, 2002, the claimant returned to Dr. Davin, who again stated his findings that the claimant was experiencing radicular symptoms in his left knee and that further evaluation was being prevented by a delay in performing back surgery. CX 27 at 74.

On February 5, 2002, Dr. Gerald L. Warnock, an associate of Dr. Tubbs, received films from the claimant's November 11, 2000 MRI scan and compared these films to the results of the claimant's MRI scan of December 21, 2001. CX 26 at 62. Dr. Warnock concluded that there was "no change from the prior exam," and that the claimant's condition had been "stable" for more than one year.

On February 6, 2002, Dr. Seres reviewed the MRI scan of December 21, 2001. EX 71 at 263. In a letter to the counsel for the employer, Dr. Seres concluded that the scan showed the presence of degenerative changes, but no specific evidence of trauma. Dr. Seres added that his review of the MRI scan did not change the opinions he expressed in his December 10, 2001 report.

On February 27, 2002, Dr. Davin again examined the claimant. CX 27 at 74. Dr. Davin noted that he had yet to review an outside examination of the claimant, but that it remained his opinion that the claimant's "back issues are preventing complete finalization of improvement on his left knee," and that the claimant might achieve "some slight improvement if the other issues were addressed." Dr. Davin reiterated that the claimant was still unable to return to his regular duties as a longshoreman.

On April 4, 2002, the claimant returned to Dr. Davin. CX 27 at 75. Dr. Davin restated his findings from the previous visit, but also found that the claimant had suffered "a setback concerning his left knee" consisting of "increased give way" and pain "coming along the anterior thigh." In addition, Dr. Davin commented that the claimant's description of his knee injury caused him to think that there was a "recurrent injury to his back." Dr. Davin declined to make a final assessment until the claimant's back issues were addressed.

On May 24, 2002, Dr. Michael Wyman took over the treatment of the claimant's knee due to the sudden death of Dr. Davin. CX 27 at 76. Dr. Wyman reviewed the claimant's chart and symptoms and took new x-rays, which revealed "adequate joint space" in the claimant's left knee and indicated that the claimant was mistaken in his assertion to Dr. Wyman that his left knee was "bone on bone." Dr. Wyman also opined that he did not think the claimant's back condition had "anything to do with his on-the-job injury," but added that he would defer to Dr. Hill on that question. In addition, Dr. Wyman found that the claimant could be released on light duty restrictions, but was incapable of "kneeling, squatting, heavy lifting, or climbing down into the hold of ships or the like," and that the claimant's left knee condition was not yet medically stationary.

On June 28, 2002, the claimant returned to Dr. Wyman. CX 27 at 77. Dr. Wyman opined that the claimant's left knee condition would benefit from increased exercise.

On August 5, 2002, the claimant was examined by Dr. Alan P. Newman, who prepared a report regarding the claimant's left knee. EX 72 at 264-67. During the examination, the claimant reported left knee pain, pain radiating up his thigh, occasional swelling and instability, difficulty sitting, and discomfort when walking. Based on the physical examination and a review of the claimant's history and x-rays, Dr. Newman concluded that the claimant's left knee was a "complex problem, with at least some contribution from radicular involvement of the lumbrosacral spine." In addition, Dr. Newman opined that the claimant's pain was "out of proportion to at least the amount of tibiofemoral degerative changes," and that "most of his knee symptoms are coming from the patellofemoral joint/extensor mechanism." Dr. Newman did not feel that total knee replacement was indicated, and instead prescribed oral medication, a cortisone injection, and physical therapy with a follow-up examination in one month.

On August 9, 2002, the claimant called Dr. Newman's office complaining of pain after the cortisone injection and requesting a prescription for pain medication, which was apparently denied. EX 73 at 268.

The claimant attended physical therapy sessions at Southwest Washington Medical Center on August 12, 19, 20, 22, 28, September 3, 4, 6, 9, 13, 16, 19, 24, 26, 27, and October 2, 3, and 10 of 2002. EX 74 at 269-70 While the handwritten chart notes describing these sessions are largely illegible, it appears the claimant complained of back and left knee pain during these visits.

On September 5, 2002, Dr. Newman again examined the claimant, who reported considerable pain in both knees and his lumbrosacral area. EX 75 at 273. The claimant also reported some improvement from the steroid injection, but said that his knee gave out following a physical therapy session. Upon examination, Dr. Newman noted reduced ability to extend the left knee from a seated position and pain when taken through a range of motion. In concluding his report, Dr. Newman opined that the primary issue regarding the claimant's left knee was improving muscle tone and "lower extremity neuromuscular status." He also recommended more physical therapy and exercises.

On October 23, 2002, the claimant returned to Dr. Newman. EX 77 at 275-76. The claimant reported some improvement in his knee, but also "lots of low back pain" to a level that prevented him

from sleeping. Upon examination, Dr. Newman noted the claimant's ability to fully extend his left leg while lying down, but not while seated. The claimant's range of motion and stability remained the same. Based on the examination, Dr. Newman concluded that "at this point the primary focus should be on getting some resolution for his lumbar sacral complaints." Dr. Newman noted that the claimant would continue in his goal of obtaining a neurological consultation. In addition, Dr. Newman stated that he wanted the claimant to continue with light duty work restrictions.

On November 22, 2002, the claimant was deposed by the counsel for the employer. EX 82 at 657-735. The claimant testified that his back did not get completely better after the 1980 accident and that he continued to suffer from pain in his "lower back and down [his] left leg." EX 82 at 676-77. The claimant testified that when he worked between 1985 and February 1999, this pain was "constant" and he "always had some pain." EX 82 at 677. In addition, the claimant testified that as a result of this lower back injury he avoided jobs requiring heavy lifting and bending. EX 82 at 674. The claimant also stated that his 1980 accident affected his recreational activities, requiring him to mostly give up fishing off of banks, and to completely give up tennis, golf, and hunting. EX 82 at 678-79. The claimant testified that, with the exception of the days he worked in February 2000, he has not looked for employment since the February 1999 accident. EX 82 at 729.

As of November 26, 2002, the claimant had unpaid bills from Dr. Hill for four office visits. The bills totaled $1,149.23 and the bills apparently remained unpaid by the time the trial commenced. CX 30 at 84, Tr. at 10.

On December 12, 2002, Dr. Newman again examined the claimant who reported increased instability of his left knee. EX 78 at 277-78. Dr. Newman recommended further strengthening exercises for the claimant's left knee and was disappointed that the claimant had been discharged from physical therapy and did not have access to a gym. In addition, Dr. Newman noted that the claimant was scheduled for a neurological examination and he scheduled a follow up appointment in order to review those results.

On January 6, 2003, at Dr. Hill's request, the claimant underwent a second CT scan, a myelogram, and an enhanced CT scan, all of which were compared to the CT scan and myelogram scan of July 6, 2001. EX 87 at 795-98. Dr. David Ciaverella interpreted the scans and noted the following impressions: (1) "[m]ild central canal stenosis at L4-5 from disc bulging as well as degenerative changes and thickening ligaments. This appears to have slightly progressed from the MRI scan from 2001. The degree of canal stenosis appears more conspicuous on the accompanying myelogram," (2) "[m]inimal to mild central canal stenosis at L3-4, similar to the prior study," and (3) "[m]oderate bilateral neural foraminal stenosis at L5-S1 as well as moderate [stenosis] on the left at L4-5 from disc bulging and degenerative facets." In an addendum to this report, Dr. Ciaverella noted that "[a]lthough no contact of the L5 nerve root is seen within the lateral recess, a small superimposed disc protrusion along the inferior left neural foramen may affect the L5 nerve root within the thecal sac, just above the lateral recess. This can be correlated to symptoms of left L5 radicular pain for significance." Based on the lumbar myelogram, Dr. Ciaverella noted "[m]ild cental canal stenosis at L4-5 from mild ventral defect but more pronounced lateral extradural defects

probably thickening posterior ligaments. The degree of canal stenosis appears moderate when the patient is stood upright."

On January 9, 2003, the counsel for the employer submitted to Dr. Laycoe portions of the transcripts of the claimant's deposition testimony and asked for an opinion regarding the effect of the claimant's February 19, 1999 accident on his back condition. EX 85 at 760-61. In response, Dr. Laycoe opined that "[i]t is probable that his [lower] back complaints after the February 19, 1999 injury where [sic] solely due to his ongoing progressive degenerative disc disease. I can't say that the 2/19/99 injury worsened his low back condition on a more probable than not basis." EX 85 at 761.

On January 14, 2003, Dr. Newman again examined the claimant, who complained of left lower extremity problems. EX 88 at 799-800. Dr. Newman noted that Dr. Hill planned to perform back surgery and that new diagnostic scans had apparently been taken. Dr. Newman deferred his physical examination, stating that he hoped that any contribution of the lower back to the claimant's knee condition would be resolved by Dr. Hill's surgery. That same day, Dr. Newman signed a form describing the claimant's physical restrictions. CX 34 at 146. The form indicated that the claimant could stand for between one and two hours, walk between one and two hours, sit for an unspecified amount of time, occasionally lift between five and ten pounds, never lift more than 10 pounds, and engage in continuous overhead reaching, simple grasping, pushing and pulling, and use of his feet to operate pedals. Dr. Newman also remarked that the claimant "cannot do [his] normal longshore job." CX 34 at 146.

On January 14, 2003, Roy Katzen prepared a vocational report based on an evaluation of the claimant conducted on December 23, 2002. EX 86 at 762-76. Mr. Katzen is a certified vocational counselor and has worked in the field of vocational assessments since 1983. EX 84 at 756. Mr. Katzen based his evaluation on a review of medical records, the claimant's deposition testimony, legal documents pertaining to the claimant's hearing loss claim, payroll records, an interview, and a series of vocational tests. In addition, Mr. Katzen researched the waterfront and general labor market in order to determine the availability of suitable jobs. Mr. Katzen concluded that, during two sample months in 2001, April and November, several suitable full-time longshore jobs were available, including positions as "master console operator" at a grain facility at the Port of Vancouver, Washington, and "second console operator" at the same facility. Mr. Katzen described these positions as being among "the lightest jobs on the waterfront" and situated in an office setting. In evaluating the general labor market, Mr. Katzen concluded that several suitable positions were available, including jobs as a clerk, photo lab worker, gate or security guard, and parking lot cashier. According to an attached Labor Market Survey prepared by Mr. Katzen, these positions pay hourly wages ranging from $6.50 to $10.00.

On January 30, 2003, Richard Ross prepared a vocational report based on an evaluation of the claimant he conducted between December 21, 2002 and January 30, 2003. CX 33 at 141. Mr. Ross is a certified vocational evaluation specialist and has worked in the field of vocational assessments since 1984. CX 28 at 78, 80. Mr. Ross based his evaluation on a review of medical records, the claimant's deposition testimony, an interview with the claimant, a series of standardized

vocational tests, and work evaluation measures. CX 33 at 141. Mr. Ross concluded that the claimant would be unable to return to his previous longshore job, and that his functional impairments and vocational capacity left the claimant with no earning capacity, with the possible exception of intermittent, part-time jobs paying at or near the minimum wage. CX 33 at 145.

At the trial, the claimant presented the testimony of two of his longtime friends, John Ronne and Mel Engels. Mr. Ronne has been a longshore foreman since 1981 and has held several high-level union positions. Tr. at 44-81. Mr. Ronne testified that unskilled longshoreman in his union are required to lift objects weighing over fifty pounds, climb, walk over uneven surfaces, push objects, drag heavy gear, and load sacks, boxes, and lumber. Tr. at 54. Though unfamiliar with the master console and second console positions, Mr. Ronne stated that these positions are "established." Mr. Ronne also testified that he does not think the claimant can work as a longshoreman. Tr. at 60. Mr. Ronne also testified that the claimant complained about his back "shortly after" his February 19, 1999 accident. Tr. at 58.

According to the testimony of Mr. Engels, he was the friend who drove the claimant from the job site to meet an ambulance at a company office on February 19, 1999. Tr. at 87-88. On the way, Mr. Engels testified, he drove over a bump and the claimant said, "My back," but then also complained about pain all over his body. Tr. at 87-90. According to Mr. Engels, he then asked the claimant if his back was hurting and the claimant answered, "My leg." Tr. at 87. However, on cross-examination Mr. Engels testified that when he asked the claimant if his back was hurting, the claimant said "No....I'm hurting all over." Tr. at 81-83, 91. Mr. Engels further testified that the claimant did not complain about his back at any other time on the day of the accident or the next day, but regularly complained about his back after his first knee surgery. Mr. Engels also testified that the claimant occasionally complained about his back before the February 19, 1999 accident. Tr. at 90. In addition, Mr. Engels testified that when he had gone fishing with the claimant, others have assisted the claimant in launching his boat into the water and that the seats on the claimant's boats have been comfortable. Tr. at 95-100.

The claimant's wife, Josephine Olson, also testified at the trial. Tr. at 101-115. Mrs. Olson testified that the claimant did not complain of leg problems between 1984 and 1999. Tr. at 104. According to her testimony, the claimant occasionally complained of back pain to Dr. Tarlow, but Dr. Tarlow "ignored" those complaints. Tr. at 108. She also asserted that the claimant switched his treatment to Dr. Davin because of Dr. Tarlow's failure to consider the claimant's complaints of knee and back pain. Tr. at 111.

According to the claimant's trial testimony, immediately following his February 1999 work injury, he told a company superintendent that he was feeling pain and numbness in his back in addition to knee pain. Tr. at 132. The claimant testified that he currently experiences a small amount of pain in his knee, and that now most of his pain is in his lower back and down his left leg. Tr. at 144. The claimant testified that he did not believe he could return to his longshore job, and that, of the jobs he was familiar with, there are not any non-skilled category jobs he can do. Tr. at 146. The claimant further testified, however, that he had not applied for crane or winch jobs because he "just [doesn't] want to do that." Tr. 165-66. Nevertheless, the claimant submitted applications, he

testified, to Ace Security, Metro Security, Burns-Pinkerton, and ADD Security, none of whom have responded, and attempted to apply at Nighthawk Security, Protective Security, and City Center Parking, all of whom were either not hiring or not accepting applications. Tr. at 181-82.

Dr. Hill also testified at trial. Tr. at 189-224. Dr. Hill reiterated his opinion that on February 19, 1999, the claimant herniated his L4-5 disc and that the herniation later caused radicular pain in his left leg. Tr. at 199. Dr. Hill also opined that there was no specific evidence that the claimant's allegedly herniated disc was the natural progression of the claimant's 1980 compression fractures. Tr. at 201. In addition, Dr. Hill asserted that the claimant has not yet reached maximum medical improvement or fully healed from the injury of February 19, 1999, and contended that the claimant will not be able to return to work until he has fully healed. Tr. at 201. Given the claimant's description of his February 19, 1999 fall, and his understanding that there were no radicular symptoms prior to the fall, Dr. Hill opined that the fall was the cause of the claimant's back condition. Tr. at 202. Dr. Hill also testified that the claimant's radicular leg pain may have been "masked" by the his knee pain, and had only become apparent when the knee pain began to subside, a phenomenon that Dr. Hill described as not unusual. Tr. at 202-03. Dr. Hill also stated that it is common for patients with herniated discs or stenosis to go for a period time without symptoms. Tr. at 213. However, Dr. Hill acknowledged that he did not have access to any of the claimant's medical records prior to the notes Dr. Davin prepared on October 4, 2000. Tr. at 209. Dr. Hill also conceded that any reports of radicular pain prior to the February 19, 1999 injury would be an important factor in forming his opinion. Tr. at 211. Dr. Hill further acknowledged that the claimant had degenerative changes at various points in his lumbar spine prior to February 19, 1999, and that these changes are "part of the reason" that a disc herniates. Tr. at 218. Dr. Hill also opined that the claimant's back condition prevented him from fully rehabilitating his left knee. Tr. at 222.

Dr. Hill's trial testimony was directly contradicted by the trial testimony of the employer's medical expert, Dr. Seres. Tr. at 331-80. According to Dr. Seres, from "an anatomical standpoint," the claimant's current back condition is due solely to degenerative changes pre-existing the injury of February 19, 1999. Tr. at 375. Dr. Seres testified that he based his opinion on his observations and his review of the medical records dating back to 1980. Tr. at 333, 42-48. Dr. Seres further opined that it would not be reasonable for the claimant's lower back pain to be masked by his left knee pain for 20 months. Tr. at 349. In addition, Dr. Seres opined that if the claimant had aggravated a pre-existing herniated disc on February 19, 1999, he would have felt immediate and severe pain. Tr. at 351. Dr. Seres further opined that the claimant can lift between 20 and 25 pounds but conceded that, based on his review of the medical records, the claimant did not have a herniated disc in 1984. Tr. at 354, 362. Dr. Seres also opined that the MRI of November 2000 does not indicate the presence of a herniated disc. Tr. at 174.

ANALYSIS

All the parties have stipulated: (1) that the claimant sustained an injury to his left knee arising out of and in the course of his employment for Marine Terminals on February 19, 1999, (2) that the

injury occurred on a maritime situs while the claimant was employed in a maritime status, (3) that there was an employer-employee relationship at the time of the injury, (4) that the claimant's average weekly wage in the 52 weeks prior to this injury was $1,665.10, and (4) that the injury to the claimant's left knee caused a 19 percent loss in the claimant's ability to use his left leg.

There are disputes among the parties concerning the following issues: (1) whether the claimant sustained any injury to his back on February 19, 1999, (2) the date of maximum medical improvement for the injury to the claimant's left knee, and (3) the extent of disability resulting from the February 19, 1999 injury. In addition, if it is determined that the claimant did in fact suffer an injury to his back on February 19, 1999, there are also disputes concerning the back injury's date of maximum medical improvement and the employer's entitlement to Special Fund relief under the provisions of subsection 8(f) of the Longshore Act. Findings concerning each of these issues are set forth below.

1. Injury Arising Out of and In the Course of Employment

Insofar as the claimant contends that he suffered work-related injuries, he is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order to use this presumption to show a causal relationship between a claimant's job and his or her impairment, a claimant must produce evidence indicating that he or she suffered some harm or pain *and* that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). However, only "*some* evidence tending to establish" both prerequisites is required and it is not necessary to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed relationship between the claimant's impairment and its alleged cause.[1] If the

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1. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). There is one court of appeals decision that appears to hold that medical testimony offered to rebut a subsection 20(a) presumption of causation is not sufficient to satisfy the requirements of the Act unless that testimony completely "rules out" any possible causal connection between a claimant's employment and the alleged disability. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297 (11th Cir. 1990) (holding that the subsection 20(a) presumption was not rebutted because no physician had offered an opinion "ruling out a potential connection" between the claimant's medical condition and his employment). However, this standard has been applied only in the Eleventh Circuit and it has been explicitly rejected by both the First and Fifth Circuits. *Bath Iron Works v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997)(holding that an "employer need not rule out any possible causal relationship between the claimant's employment and his condition" because such a requirement "would go far beyond the

presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280-81 (1994), the ultimate burden of proof then rests on the claimant. *See also, Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995). If the presumption is not rebutted with substantial evidence, a causal relationship between the worker's job and his or her impairment must be presumed. However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

In evaluating medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in

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substantial evidence standard set forth in the statute"); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)("unequivocally" rejecting a "'ruling out' standard" and noting that the text of subsection 20(a) requires only "substantial evidence" to rebut the presumption). Moreover, the Fourth and Seventh Circuits have implicitly rejected a "ruling out" standard by issuing decisions holding that all it takes to rebut a subsection 20(a) presumption is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 817-18 (7th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 263 (4th Cir. 1997).

In this case, the claimant's alleged work injuries occurred in the Ninth Circuit, which has not yet considered the argument that subsection 20(a) requires an employer to provide evidence completely ruling out even a hypothetical possibility of a causal relationship. However, the Ninth Circuit's most recent decision concerning the application of subsection 20(a) suggests that if the issue were to be presented, this circuit would join with the First, Fourth, Fifth and Seventh Circuits in rejecting any such standard. In that decision, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999), the court did not in any way suggest that medical evidence that fails to completely "rule out" even the possibility of causation is in any way insufficient or equivocal. Rather, the court expressed agreement with the Benefits Review Board's observation that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. Moreover, the BRB has recently held that medical opinions that are within a "reasonable degree of medical certainty" cannot be rejected as being "equivocal" just because such opinions do not "rule out" even the hypothetical possibility of a causal relationship. *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-43 (2000).

the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

It is also noted that under the so-called "aggravation rule," a claimant seeking benefits under the Longshore Act does not have to show that a work injury was the sole cause or even the principal cause of a disability. Rather, a claimant need only show that an employment-related injury aggravated, accelerated, or combined with a pre-existing impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If a claimant is successful in making such a showing, his or her entire impairment is compensable. *Id.*

In this case, the claimant's contention that he suffered a work-related back injury on February 19, 1999 is supported by the following evidence: (1) The claimant's own testimony that immediately after his February 19, 1999 injury he told an unnamed superintendent that his back was numb and hurting , (2) the testimony of the claimant's wife that her husband repeatedly complained about his back to Dr. Tarlow, (3) the testimony of Mr. Engels and Mr. Ronne that the claimant had complained to them about back pain following the February 1999 injury, (4) the testimony of Dr.Hill that in his opinion the claimant herniated a disc in his lumbar spine when he fell on February 19, 1999, (5) a notation by Dr. Davin indicating that the claimant's description of his knee injury caused him to think that there was also a "recurrent injury to his back," and (6) the results of the MRI and CT scans showing a disc bulge or herniation at level L4-5 of the claimant's lumbar spine. This evidence is sufficient to warrant invocation of the subsection 20(a) presumption of compensability.

The employer's contention that the claimant did not suffer any injury to his back on February 19, 1999 is supported by the following evidence: (1) medical records showing that the claimant suffered a series of back injuries prior to February 1999 and had reported radicular left leg symptoms to physicians at least eight times prior to February 1999, (2) the absence of any medical record references to back pain or left leg radicular symptoms during the 20-month period between February 19, 1999 and October 30, 2000, and (3) Dr. Seres testimony that the claimant's current back condition is due solely to the natural progression of degenerative changes in the claimant's spine that existed prior to his February 19, 1999 work injury. This evidence is sufficient to rebut the subsection 20(a) presumption.

Accordingly, it is necessary to weigh all the evidence in order to determine if the claimant has shown the occurrence of a compensable injury to his back by a preponderance of the evidence. After considering all the relevant evidence, it has been determined that the claimant has failed to show by a preponderance of the evidence that his February 19, 1999 work injury in any way caused, aggravated, or accelerated his back condition.[2] There are five reasons for this conclusion.

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2. For this reason, the employer has no obligation to pay any of Dr. Hill's bills for the treatment of the claimant's back condition.

First, the claimant's medical records and pre-trial deposition testimony clearly establish that the claimant had suffered radicular symptoms in his left leg since 1982 and had reported such symptoms to physicians at least eight times during the period between 1982 and March of 1996. *See* EX 8 at 15, EX 9 at 18, EX 10 at 20, EX 12 at 26, EX 13 at 27-28, EX 80 at 430-42, EX 80 at 431, EX 82 at 676-77. This fact strongly supports Dr. Seres' opinion that the claimant's current back and radicular left leg symptoms are merely the result of the natural progression of a degenerative condition that existed prior to his February 1999 work injury.

Second, although the claimant, the claimant's wife, and two of the claimant's friends have testified that the claimant complained of back pain on the day of his February 1999 work injury or shortly thereafter, there are no medical records to corroborate this testimony. Indeed, the records prepared by the ambulance crew indicate that the claimant specifically denied any back pain on the day of the injury. Moreover, as the employer points out, it was not until 20 months after the February 1999 work injury that any physician recorded any complaints of back pain or left leg radicular symptoms. Significantly, in the interim period, the claimant underwent numerous medical examinations and was seen by at least three different physicians (Dr. Tarlow, Dr. Laycoe, and Dr. Davin). Collectively, this evidence suggests that any back-related symptoms that the claimant may have experienced during this interim period were not materially different from the back symptoms that he had been experiencing since his 1980 work injury. It is also noted that although the claimant and his wife have testified that the decision to switch to Dr. Davin from Dr. Tarlow was in part motivated by Dr. Tarlow's alleged failure to pay attention to the claimant's complaints of back pain, Dr. Davin's treatment records do not contain any reference to such back pain or radicular leg symptoms until at least six months after that switch occurred. Indeed, the only reference to the claimant's back in Dr. Davin's records of his initial visit with the claimant is a statement indicating that the claimant had suffered a 1980 back injury that "healed uneventfully." Although it is conceivable that the claimant's knee pain might have "masked" his back or radicular pain for some period of time after the February 1999 injury, as Dr. Seres testified, it seems extremely unlikely that such masking could have continued for as long as 20 months. Likewise, it also seems extremely unlikely that over a 20-month period three different physicians would repeatedly fail to record complaints of back pain.

Third, although Dr. Hill has opined that the claimant's February 1999 work injury caused the herniation of a disc in the claimant's lumbar spine and subsequent radicular left leg symptoms, that opinion is severely undermined by Dr. Hill's admission that he was unaware that the claimant had suffered from radicular left leg symptoms for many years prior to February of 1999. Likewise, Dr. Davin's notation concerning the cause of the claimant's back complaints fails to contain any indication that Dr. Davin knew about or had considered the claimant's long history of back and radicular left leg complaints.

Fourth, although Dr. Laycoe once suggested that the claimant's back complaints might be related to alterations of the claimant's gait following his knee injury, no other physician has concurred with this theory. Moreover, Dr. Laycoe, himself, later indicated that he does not think it is more likely than not that there is any sort of causal relationship between the claimant's February 19, 1999 work injury and his subsequent back complaints. *See* CX 18 at 45-48, EX 85 at 761.

Finally, the records that Dr. Wyman prepared during the period he treated the claimant indicate that he too failed to see any causal connection between the claimant's back problem and his 1999 work injury. *See* CX 27 at 76.

2. The Date of Maximum Medical Improvement for the Claimant's Knee Injury

A disability is considered permanent as of the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

In this case, the employer asserts that the knee injury became permanent and stationary on November 8, 2000. This position is apparently based on the opinion set forth in Dr. Laycoe's report concerning the examination he conducted on the claimant on November 8, 2000. CX 18 at 42-48. On the other hand, the claimant has not suggested a date of maximum medical improvement for his knee injury. Instead, he contends that he needs surgery on his back and that therefore his overall medical condition has still not reached the point of maximum medical improvement.

Review of the relevant medical reports indicates that, besides Dr. Laycoe, only two other physicians, Dr. Davin and Dr. Wyman, have expressed opinions on the permanency of the claimant's left knee injury. According to Dr. Davin's reports, the claimant's left knee injury was "essentially medically stationary" on April 11, 2001. CX 27 at 69. Likewise, on September 12, 2001, Dr. Davin again commented in his treatment notes that the claimant was "at the point where he is medically stationary." CX 27 at 72. In contrast, on May 24, 2002, Dr. Wyman noted that the claimant's knee condition was still not medically stationary. CX 27 at 76.

After consideration of all relevant evidence, it has been concluded that the opinion of Dr. Davin should be given the greatest weight on this issue and that therefore the claimant's left knee injury reached the point of maximum medical improvement on April 11, 2000. There are three reasons for this conclusion.

First, Dr. Davin's opinion is entitled to greater weight than the opinion of Dr. Laycoe because Dr. Davin was the primary treating physician and saw the claimant on far more occasions than Dr. Laycoe. Although Dr. Davin's treatment notes contain more than one passage in which Dr. Davin opined that the claimant's knee condition had become stationary, the earliest of these notations has been selected as the date of maximum medical improvement because the notations on the subsequent dates were merely reaffirming the permanency of the claimant's knee condition.

Second, although Dr. Wyman briefly became the claimant's treating physician after the sudden death of Dr. Davin, Dr. Davin had provided most of the treatment for the claimant's knee condition and Dr. Wyman had examined the claimant on only a few occasions.

Third, although Dr. Wyman has opined that the claimant's knee condition was still not permanent in May of 2002, that opinion does not appear to be medically reasonable. Indeed, by May of 2002 the knee condition had already been under treatment for more than three years and more than two years had elapsed since the claimant's last knee surgery. Dr. Wyman's opinion is also inconsistent with the opinions of both Dr. Davin and Dr. Laycoe.

3. Extent of Disability

If a worker suffers an injury to one of the body parts listed in subsections 8(c)(1) to 8(c)(20) of the Act, (e.g., a leg injury), the injury is considered to be a "scheduled injury" and the amount of compensation for the injury is ordinarily the amount set forth in the relevant subsection. However, if a scheduled injury is so severe that it permanently precludes a worker from returning to any type of employment, the injury can be considered to be totally disabling and the worker becomes entitled to permanent total disability benefits. *See Potomac Electric Power Co. (PEPCO) v. Director, OWCP*, 449 U.S. 268, 277 n. 17 (1980). Conversely, under the *PEPCO* decision, if a worker who has suffered a scheduled injury is unable to prove that the injury precludes him or her from performing any type of work, the worker's compensation for the injury must be based on the provisions of subsection 8(c)(1) to 8(c)(20) of the Act. Injuries to a worker's leg are governed by the provisions of subsection 8(c)(2) and 8(c)(19). In combination, those subsections provide that a worker who has suffered a permanent partial loss of use of a leg is entitled to that portion of 288 weeks compensation which is equal to the percentage of the use of the worker's leg that has been lost, even if there is no proof of an actual loss of wage earning capacity. *See Henry v. George Hyman Construction Co.*, 749 F.2d 65 (D.C. Cir. 1984). In determining the extent of loss of use of a body part, an administrative law judge may rely on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter the "AMA *Guides*"), but is not required to use those guidelines, except in cases involving hearing losses under subsection 8(c)(13) and occupational diseases covered under the provisions of subsection 8(c)(23). *Ortega v. Bethlehem Steel Corporation*, 7 BRBS 639 (1978).

In this case, the claimant apparently contends that the combination of his February 19, 1999 knee injury and his pre-existing impairments caused him to be permanently and totally disabled. In contrast, the employer contends that these impairments do not preclude him from working as a longshoreman or in various other jobs. Accordingly, the employer contends, the claimant's

compensation is limited to the amounts prescribed under subsections 8(c)(2) and (c)(19) for his left leg injury. As the parties have stipulated, the claimant has a 19 percent loss of use of his left leg. Therefore, if the employer prevails on this issue, under the provisions of subsections 8(c)(2) and (c)(19), the claimant would not be entitled to recover more than 54.72 weeks of disability benefits (i.e., 19 percent times 288 weeks). Conversely, if the claimant is able to prove that his knee injury and pre-existing impairments preclude him from performing any type of employment, he would be entitled to receive either temporary or permanent total disability benefits.

In cases involving disputes over an injured worker's ability to return to work, the burden is initially on the claimant to show that he or she cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. In determining if such a job opportunity is realistically available, it is necessary to consider whether there exists a reasonable likelihood that a person with the claimant's age, education and background would be hired if he or she diligently sought the job. *See Hairston v. Todd Shipyards*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990).

In an effort to establish that he is unable to return to any type of employment, the claimant relies on his own testimony, the testimony of Mr. Ronne, and the testimony of vocational evaluator Richard Ross. In contrast, the employer's contention that the claimant is not totally and permanently disabled is based primarily on the testimony of Mr. Katzen.

Review of the medical and vocational evidence indicates that the claimant's knee injury precludes him from performing the type of longshore job that he was performing on the date of that injury. Therefore, the employer has the burden of proving that suitable alternative jobs are available to the claimant. After considering all the evidence in this regard, it has been determined that such alternative employment is in fact available to the claimant and that he is therefore only entitled to receive a scheduled award for his knee injury under the provisions of subsections 8(c)(2) and 8(c)(19) of the Act. There are three reasons for this conclusion.

First, Mr. Ross's opinion that the claimant is now unemployable is based on a variety of impairments including back-related limitations that did not exist at the time of the claimant's February 19, 1999 injury and, as explained previously, did not arise out of or in the course of the claimant's employment by Marine Terminals Corp. Rather, the back limitations developed independently and more than 20 months after the February 1999 injury. Hence, it is not appropriate to consider such limitations when determining if the employer has met its burden of showing suitable alternative employment. Instead, only the limitations that existed at the time of the injury and those which developed as a result of the injury can be considered.

Second, even if the claimant's post-injury back-related impairments were considered, the preponderance of the evidence indicates that there are still some longshore jobs that could be obtained

and performed by the claimant. Most significantly, the weight of the evidence supports Mr. Katzen's opinion that the claimant could find steady work as a master console operator or second console operator and that the physical requirements of those jobs would be within the claimant's existing medical limitations. *See* EX 86 at 771-73, Tr. at 274-82, 288-89 (Mr. Katzen's descriptions of the availability of master console operator jobs to senior longshoremen like the claimant and the physical activities required to perform those jobs). In this regard, it is recognized that Mr. Ross has asserted that the claimant would not be hired for console operator jobs and speculated that the claimant's hearing impairment might preclude him from performing the part of these jobs that requires him to communicate over a radio. Tr. at 240-41 (testimony of Mr. Ross). However, those opinions are not convincing. For example, Mr. Ross's assertion that the claimant doesn't have the skills or ability to be a master console operator is outweighed by Mr. Katzen credible testimony that employers of console operators have to take whomever is dispatched from the union hiring hall and that, as a result, console operator jobs are "often" performed by "casual" or "B-registered" longshore workers, i.e, persons with limited experience in the job. Tr. at 277. Likewise, although the claimant does have a hearing loss and uses hearing aids, the claimant's friend, Mr. Engels, testified that he is unaware that the claimant has any problem in communicating. Tr. at 179 (claimant's testimony), Tr. at 94 (testimony of Mr. Engels). Moreover, Mr. Katzen's report indicates that console operators work in an office environment, rather than at facilities where there is distracting background noise. EX 86 at 772.

Third, it is clear that various additional, non-maritime jobs would also be available to the claimant if he did not have the back impairments that developed subsequent to his February 1999 knee injury. For example, the evidence indicates that if the claimant had only the limitations that were placed on him before he began complaining of back pain in October of 2000, the claimant would be able to find and perform security guard or parking lot cashier jobs. *See* CX 27 at 65 (September 6, 2000 notes of Dr. Davin indicating that the claimant's knee impairment did not preclude him from performing sedentary or light duty jobs, so long as he was not required to engage in ladder climbing, stair climbing, kneeling, or crawling); EX 86 at 774-788 (portions of Mr. Katzen's report pertaining to security guard and parking lot cashier jobs). In comparison, not all of these jobs would be within the claimant's limitations if he had the additional limitations Dr. Davin imposed after the claimant began seeking treatment for his back condition in October of 2000. *See* CX 27 at 68 (January 31, 2001 notes of Dr. Davin indicating that the claimant had become limited to "essentially sedentary work"). Finally, it is noted that the claimant testified that he recently applied for some of these non-maritime jobs, but was not hired. Tr. at 181-82 However, his testimony indicates that his efforts to seek these jobs did not begin until just two weeks before the trial. Tr. at 182. For that reason, there is insufficient reason to believe the claimant would not eventually be hired for one of the security guard or parking lot cashier jobs identified by Mr. Katzen, if he were to make a diligent effort to obtain such jobs.

ORDER

1. The employer shall pay the claimant temporary total disability compensation for the period beginning on February 20, 1999 and ending on April 10, 2000 at a weekly compensation rate of $871.76.

2. Beginning on April 11, 2000 and for the next 54.72 weeks the employer shall pay the claimant permanent partial disability compensation at a weekly compensation rate of $871.76.

3. The employer shall receive credit for all compensation paid to the claimant since February 20, 1999, including any compensation payments that exceed the amounts awarded in this Decision and Order.

4. The employer shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at rates determined by the District Director.

5. The District Director shall make all calculations necessary to carry out this order.

6. The employer shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the February 19, 1999 injury to the claimant's left knee, but is not obligated to provide any medical care for the treatment of the claimant's back condition.

7. The counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for the employer within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, the counsel for the employer shall initiate a verbal discussion with the counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the counsel for the claimant shall within 30 calendar days after the date of service of the initial fee petition provide the undersigned and the counsel for the employer with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the employer and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for the employer shall file a Statement of Final Objections and serve a copy on the counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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Paul A. Mapes
Administrative Law Judge